Mem.r Countess of Caithness
&
the Countess & Earl of Fife
and
Sir John Sinclair

MEMORIAL

FOR

The COUNTESS of CAITHNESS;

AGAINST

The COUNTESS and EARL FIFE,

AND

Sir John Sinclair of STEVENSON,

Baronet.

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MEMORIAL

FOR

Margaret, Countess of Cashmere,

AGAINST

Jan. 16. 1766.

MEMORIAL

FOR

Margaret, Counteſs of *Caithneſs*;

AGAINST

The Counteſs *Fife* and Earl *Fife*, for his intereſt, and Sir *John Sinclair* of *Steveniſon*, Baronet.

IT is always diſagreeable when law-ſuits ariſe between very near relations; and therefore the memorialiſt muſt begin with ſaying, That ſhe regrets extremely her being obliged to bring a proceſs in this court againſt her own daughter, and indeed her only child: But ſince that daughter has unhappily been very ill adviſed, the memorialiſt, in juſtice to herſelf, and others, is bound to apply to your Lordſhips, in order to obtain what ſhe hopes law and equity, not to mention the tender conſiderations of natural affection, muſt allow her.

The proceſs which ſhe has brought againſt theſe defenders, as repreſenting her huſband the late Earl of Caithneſs, CONCLUDES, *Firſt*, For payment of 300 l. Sterling, in name of aliment to her, from the 9th of December 1765, the day of her huſband's death, to Whitſunday

1766, the first term at which a liferent-annuity provided to her in her contract of marriage took place. *Secondly*, For payment of 600 l. Sterling, in name of mournings for her: And *Thirdly*, To provide her in a convenient jointure-house, or otherways to pay, or grant security to her for 100 l. Sterling yearly on that account, payable at two terms, Whitsunday and Martinmas, by equal portions.

The cause came before the Lord Justice Clerk Ordinary, who, on the 13th December 1766, made avisandum to the Lords, and ordained parties procurators to give in memorials to the boxes on or before the 13th of January next. In obedience to his Lordship's orders, this is humbly offered on the part of the pursuer.

Dec. 13. 1766.

March 4. 1738. Jan. 14. 1744.

By the contract of marriage, dated 4th of March 1738, and registered in the books of Council and Session 14th January 1744, entered into between Alexander Earl of Caithness on the one part, and Lady Margaret Primrose the memorialist on the other part: The said Earl, *inter alia*, bound and obliged him and his heirs of whatever kind or quality, which heirs shall not have the benefit of being discussed in order, and his executors and successors whatsoever, to make payment to the said Lady Margaret Primrose, in case she shall happen to survive him, of an annuity of 3000 Merks Scots money, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first term of Whitsunday or Martinmas after his death, for the half year immediately preceeding, and so forth yearly and termly during her lifetime, with a tenth part more of liquidate penalty in case of failzie: As ALSO, The said Earl obliges him and his foresaids, to provide her in a convenient jointure-house.

Dec. 9. 1765.

The Earl of Caithness died on the 9th December 1765. His heritable estate was settled by a deed in favour of Sir John Sinclair of Stevenson; and Lady Dorothea Sinclair Countess

Counteſs Fife, the Earl's only ſurviving child, was executor confirmed to him; ſo that Sir John Sinclair and Counteſs Fife, with Earl Fife her huſband, for his intereſt, are the defenders in this proceſs.

When this action was firſt heard before the Lord Ordinary, the memorialiſt was a good deal ſurpriſed to find the defenders, with the aid of able counſel, endeavouring to ſhuffle her off by frivolous pretences, that it was not decided who ſhould be liable for her claims. It was pleaded for Sir John Sinclair, that the aliment till the commencement of her annuity, and the mournings, ſhould affect the executor; and Counteſs Fife's counſel as ſtrenuouſly contended, that they muſt be conſidered as debts upon the heir. The intention of all which was ſhortly this, that while each of the defenders could advance any plauſible pretext of being free, the memorialiſt ſhould have recourſe upon neither of them. The memorialiſt would be aſhamed to trouble your Lordſhips with many words upon this head. She apprehends that, however the repreſentatives of the late Earl of Caithneſs may differ among themſelves, ſhe, as a juſt and lawful creditor upon the eſtate, is entitled to a decerniture againſt them, leaving them to have recourſe againſt each other for their relief. The memorialiſt will therefore proceed to ſtate to your Lordſhips, the grounds of the ſeveral claims for which ſhe has brought the preſent proceſs; and as ſhe is humbly confident, that her claims are juſt and reaſonable, her memorial ſhall be very ſhort; for the memorialiſt cannot help thinking it highly improper in parties, to trouble your Lordſhips with voluminous papers loaden with words, on points perfectly ſimple: She conſiders it as a real injuſtice to her fellow-ſubjects, whoſe cauſes are depending before this court, to block up your Lordſhip's way, and retard that diſpatch of buſineſs which is now ſo univerſally and gratefully acknowledged.

And

And, in the firſt place, with regard to her aliment from the time of the Earl her huſband's deceaſe, till the firſt term of payment of her liferent-annuity, the memorialiſt apprehends, that it cannot be diſputed, that an aliment of ſome kind is moſt certainly due. This is founded in reaſon and, confirmed by univerſal practice. Nor will your Lordſhips pay much regard to an objection ſtated by the defenders, That as the memorialiſt had, for many years before her huſband's death, ceaſed to live in family with him, and enjoyed a ſeparate aliment, a proportion of this was paid her at the Martinmas preceeding the Earl's death; ſo that ſhe ſhould be entitled to no other aliment till the term of her liferent ſhould commence.

And the defenders have endeavoured, with ſome degree of keenneſs, to maintain, that the 300 l. demanded by the memorialiſt in name of aliment, is a ſum altogether extravagant, and quite diſproportioned to that reaſonable allowance which the law ſhould in any caſe grant to her. The memorialiſt muſt be forgiven to ſay, that ſhe cannot help being very much ſurpriſed to hear ſuch arguments as this thrown out by the defenders. It is a proof that, when people calculate riches, they proceed upon very different principles with reſpect to others, from what they do with reſpect to themſelves; and what is merely a competency to thoſe who make the calculation, becomes an extravagant ſum when transferred to another, though of the ſame rank and ſtation in the world; nay, even a ſmall proportion of our own competency, will be magnified to an exorbitant value when given to another. In the caſe now before your Lordſhips, it will no doubt be conſidered, that the late Earl of Caithneſs died in very opulent circumſtances; that Sir John Sinclair has got a large heretable ſucceſſion upon eaſy enough terms; and that Earl Fife, for his intereſt, has got a noble executry: And

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yet theſe defenders, with all their riches, can come before your Lordſhips, and maintain that 300 l is an extravagant ſum as an aliment to the Counteſs of Caithneſs, for the firſt term after the deceaſe of her Lord. The memorialiſt will leave this obſervation with your Lordſhips, ſenſible that ſhe need not inforce what muſt of itſelf ſpeak home to every unprejudiced mind.

The defenders, in order to beat down this ſmall demand of 300 l. have been pleaſed to ſay, that the memorialiſt's aliment, if any ſhould be granted, ought to be in proportion either to the conventional aliment during her huſband's life, which was 200 l. or to her liferent-annuity after his deceaſe, which is 3000 merks; and in this manner would they aſcertain the *quantum* for this article. But it is humbly hoped, that your Lordſhips will conſider ſuch rules of modification, as by no means applicable in the preſent caſe; for, with reſpect to the ſeparate aliment during her huſband's life, whatever hardſhips ladies in the ſituation the Counteſs then was, may ſubmit to, or however convenient they may find it, to ſubſiſt on a ſmall allowance, rather than expoſe family-differences, and hurt their own children, the law will never take advantage of that prudence and delicate propriety of conduct, and make it a reaſon why ſcanty proviſions ſhould be continued, when there is no neceſſity for it. The law will rather conſider ſuch conduct as highly commendable, and in awarding after-proviſions, will have an eye towards making up for ſuch deficiencies as a lady may have voluntarily ſuffered from the moſt laudable motives. It is true, that in a former caſe, Nov. 18. 1737, *Boſwal* contra *Boſwal*, the Lords found, "That the proportion of the conventional aliment muſt be the rule in determining the *quantum* of an aliment to a widow till the firſt term after her huſband's deceaſe." But your Lordſhips will attend to an exception made in that deciſion, which is, "That

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' ſuch proportion ſhall take place, *unleſs it can be ſhown, that from the circumſtances of the eſtate, there is place for a larger.*" The exception does moſt ſtrongly apply to the eſtate of Caithneſs, where, when every thing is conſidered, there is certainly place for a much larger proviſion. But your Lordſhips will farther conſider, that, during the Earl's lifetime, there were indeed two families to be ſubſiſted upon the eſtate; and it will alſo occur to your Lordſhips, that, on the Earl of Caithneſs's death, the Counteſs muſt neceſſarily have been involved in very conſiderable expence. She muſt have been obliged to receive an extraordinary number of viſitants: The honours of Caithneſs were in a ſort of *hæreditate jacente;* and therefore the memorialiſt was for a time the only proper repreſentative, and of conſequence was obliged, in ſome ſort, to ſuſtain the dignity of the family. And however much ſhe had lived retired during her huſband's life, or however much ſhe might chuſe to ſequeſter herſelf from the world afterwards, when ſhe ſhould have no other dependence than a ſmall jointure; yet it was impoſſible for her, on that occaſion, to avoid appearing in any other light than as Counteſs of Caithneſs, and widow of that Earl, who was juſt deceaſed in ſuch opulent circumſtances. And as to the argument, that her aliment ſhould be in proportion to her jointure, which proportion the defenders have been pleaſed to calculate very nicely, as correſponding to the *ratio* of 5 months to 12, the memorialiſt hopes, that ſuch a proportion will never be adopted by your Lordſhips; for it muſt be conſidered, that although, at the time of the Earl of Caithneſs's marriage, the jointureprovided to the memorialiſt was reaſonable enough, the landed eſtate being then but 500 l. a-year; yet, by the great increaſe of the Earl's fortune, her jointure muſt now be looked upon as very ſmall. His Lordſhip died in poſſeſſion of a landed eſtate of 1000 l. a-year, and more than 30,000 l. of money,

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out of all which an annuity of 3000 merks to the Counteſs Dowager is ſurely very inconſiderable; when your Lordſhips take it along with you, that this ample heretage is not taken up by an Earl of Caithneſs, but is partly tranſmitted to a gentleman, who, though extremely deſerving, is but a very diſtant connection; and partly ſunk in a family already abounding in wealth. The memorialiſt hopes, that your Lordſhips will attend to her jointure from a very different view from that of the defenders: She hopes that the ſmallneſs of her jointure, will be a ſtrong inducement to your Lordſhips, to grant her as liberal proviſions in other reſpects as equity will allow.

And the memorialiſt will therefore proceed to lay before your Lordſhips, the *ſecond* claim for which ſhe has brought this proceſs, *viz.* Her allowance for mournings. Your Lordſhips know, that it is eſtabliſhed in our law, that a widow is entitled to mournings ſuitable to the rank and quality of her deceaſed huſband. The law has in this ſhown a moſt reaſonable and humane attention to the unhappy ſituation of the widows of men of diſtinction, who, while their huſbands live, are entitled to an equal ſhare with him in every advantage of the family; but upon his deceaſe, when the family is repreſented by another, are reduced to a ſituation greatly inferior to that which they have long enjoyed, And therefore the law does, with a proper tenderneſs, take care, that they ſhall not all at once undergo ſo great a change of circumſtances. The law grants them a ſuitable allowance for mournings, as a decent *ſolatium luctus*, till they have time to reconcile their minds to a different ſtile of life. The memorialiſt claims the ſum of 600 l. for the article of mournings; and ſhe humbly apprehends, that no leſs a ſum can be conſidered as ſuitable to the rank and quality of the Earl of Caithneſs, her deceaſed huſband. The defenders indeed have endeavoured to ſhow, that this ſum is greatly too high; and

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in order to do this, they have, it ſeems, been exceedingly inquiſitive, that they might ſtate to your Lordſhips the particular ſituation of the memorialiſt's houſehold, the number of her domeſtics, and the expence which ſhe might be ſuppoſed to incur. Your Lordſhips, it is hoped, will agree with the memorialiſt, that this is rather ungenteel, conſidering the peculiar misfortunes under which ſhe was circumſtanced, which made her for many years ſubmit to very great hardſhips, while ſhe laboured under a bad ſtate of health, and made her even contract debts to a conſiderable extent, rather than take violent meaſures to force what was certainly due to her, and which, had ſhe inſiſted on, ſhe would not now have been under ſo great a neceſſity of making this application to your Lordſhips. The memorialiſt does humbly maintain, that ſhe is entitled to ſuch a ſum in name of mourniugs as the Counteſs-Dowager of Caithneſs ought to have, although, perhaps, long habits of retirement, or, perhaps, the honeſt conſideration of doing juſtice to her creditors, prevented her from actually expending ſuch a ſum. Had the memorialiſt been otherways ſituated, had ſhe been under no obligation to obſerve a ſtrict oeconomy, and had appeared in the ſumptuous manner in which the repreſentative of the noble family of Caithneſs was well entitled to do, ſhe apprehends, that the money ſo laid out, muſt have been conſidered as an unqueſtionable onerous debt upon her huſband's heirs, and been paid without any heſitation: It would therefore be extremely hard, if, after having made a very proper appearance, ſhe ſhould be curtailed of her allowance, becauſe, perhaps, ſhe may have ſaved a part of it with the moſt honourable intentions.

And, under the article of mournings, the memorialiſt muſt likewiſe beg leave to trouble your Lordſhips, with a requeſt for ſomething in name of mourning-furniture: That this is a reaſonable requeſt, will hardly be denied,

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as the memorialiſt can bring a variety of inſtances where it has been granted to widows of rank, ſome of whom have had a whole floor put into mourning for their uſe, even while they continued to live in the ſame houſe with the repreſentative of the family; and this mourning-furniture was afterwards entirely carried away by ſuch widows, upon their removing to houſes of their own. The memorialiſt cannot but think her requeſt reaſonable, ſince, by her contract of marriage, ſhe has renounced her half and third of moveables, and no ſum is allotted to her for furniture.

The *laſt* article which the memorialiſt claims in the preſent proceſs, is her jointure-houſe, for which ſhe has an expreſs clauſe in her contract of marriage, in theſe terms; "As alſo the ſaid noble Earl obliges him and his foreſaids, 'to provide her to a convenient jointure-houſe." The defenders, however willing, could not venture directly to oppoſe ſo expreſs a clauſe in her contract of marriage: but the ingenuity of their able counſel, after beating about a long time, fell at laſt upon a moſt extraordinary device: They found out, that there are two ſort of houſes upon the eſtate of Caithneſs, when in reality there is only one which is even tolerable, and which hardly deſerves the name of a houſe for a noble family, although the laſt Earl made a ſhift to put up in it. And upon this conceit of there being two houſes upon the Caithneſs-eſtate, did Sir John Sinclair's learned lawyer gravely plead, that as the marriage-contract is ſilent as to any ſum in lieu of the jointure-houſe, ſo he muſt interpret the Earl's intention, as if it was underſtood, that the principal meſſuage ſhould go to the heir, and the other ſhould go to the widow; and ſo, if the Counteſs of Caithneſs is pleaſed with this, ſhe is welcome to it; if not, Sir John inſiſts that he is bound to provide her in no other houſe, nor to pay for a houſe to her. The memorialiſt will not take up your

Lordſhips time with a ſerious refutation of this moſt extraordinary defence: She will not repreſent how hard it would be, ſhould her jointure-houſe be in Caithneſs, and ſhould ſhe be carried away from all her friends and acquaintance, and relegated to a cold and diſtant corner, to which her whole furniture and other neceſſaries muſt alſo be tranſported. She is perſuaded that, however ſuch a defence might be thrown out in the warmth of a pleading before the Lord Ordinary, it will never be ſeriouſly repeated in a memorial to your Lordſhips. The truth is, that neither my Lord her huſband, nor the memorialiſt, had it ever the leaſt in their view that her jointure-houſe ſhould be in Caithneſs. The Earl never choſe that ſhe ſhould live there during his lifetime, and ſince his death, her connection with that country is entirely diſſolved. She has, on the contrary, all along reſided at Edinburgh, and it is there ſhe apprehends her jointure-houſe muſt be. Indeed, for theſe many years paſt, a jointure-houſe, properly ſo called, has gradually gone into diſuſe; as it has been found more convenient to give widows a certain yearly ſum in name of a jointure-houſe, that they may provide houſes for themſelves: and they have accordingly choſen to ſettle either in the capital, or in ſome other of the towns in Scotland, where they can live more agreeably, and have the comforts of ſociety at leſs expence, than if they inhabited any old manſion in the country.

The memorialiſt, with humble ſubmiſſion to your Lordſhips, would ſtill beg leave to mention 100l. a-year, as ſet forth in her libelled ſummons, as a penal ſum, in caſe a proper jointure-houſe is not made good to her. Your Lordſhips know how greatly the rent of houſes has been raiſed within theſe few years; and that, from the improvements in elegance, which are daily advancing in this city, a houſe which a lady of quality might have lived in very decently ſometime ag[illegible] have a

very poor appearance. The memorialiſt would be far from ſetting herſelf up as an advocate for modern luxury; but the requiſites for people of rank are only to be determined by the faſhion of the age in which they live; and ſhe conſiders it as a matter of conſequence, to have a houſe ſuitable to her quality; becauſe, it would put her in a way of appearing with ſome degree of reſpect, even upon her ſmall annuity. She therefore ſubmits this article to your Lordſhips, with humble confidence, that you will find her entitled to a jointure-houſe ſuitable to her quality, or rather to ſuch an yearly ſum in name of a jointure-houſe as to your Lordſhips ſhall ſeem proper.

Upon the whole, the memorialiſt humbly hopes, your Lordſhips will be of opinion, that her ſeveral claims, 1*ſt*, For aliment from her huſband's deceaſe, to the firſt term of her liferent-annuity; 2*dly*, For mournings and mourning-furniture; and 3*dly*, For a jointure-houſe, are all very reaſonable; more eſpecially, as ſhe ſubmitted to live on a ſcanty ſeparate aliment during her huſband's life, and is to have a very ſmall liferent-annuity out of his opulent fortune.

In reſpect whereof, &c.

JAMES BOSWELL.